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SHOULD WE ABANDON THE DISTINCTION BETWEEN GOVERNMENTAL AND PRIVATE FUNCTIONS IN DETERMINING THE TORT LIABILITY OF A MUNICIPAL CORPORATION FOR NEGLIGENCE IN AFFIRMATIVE CONDUCT?—A recent case raises anew the old question of liability of a city for the torts of employees. In *Fowler* v. *City of Cleveland* [1] it was held that an action will lie against a city for injuries occasioned by the negligence of members of its fire department.

It has become a common ritual that for performance or non-performance of governmental duties no liability attaches to a municipal corporation for the willful or negligent acts of employees, unless a statute expressly so provides.[2] But for performance or non-performance of private or corporate duties the same responsibility attaches to a municipal corporation as to any private corporation or individual.[3] Hence it is almost universally held that a municipality is not liable for injuries

[1] 126 N. E. 72 (1919). See RECENT CASES, p. 91, *infra*.

[2] Hill *v.* Boston, 122 Mass. 344 (1877); Eastman *v.* Meredith, 36 N. H. 284 (1858). See 1 BEACH, PUBLIC CORPORATIONS, § 734; 3 ABBOTT, MUNICIPAL CORPORATIONS, § 955; COOLEY, MUNICIPAL CORPORATIONS, § 115; 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1626.

[3] Stanley *v.* The Inhabitants of Town of Sangerville, 109 Atl. 189 (1920); Bailey *v.* Mayor of New York, 3 Hill (N. Y.) 531 (1842). See 1 BEACH, PUBLIC CORPORATIONS, § 738; 3 ABBOTT, MUNICIPAL CORPORATIONS, § 955; 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1626.

caused by the negligence of members of its fire department.[4] The court in *Fowler* v. *City of Cleveland* [5] admitted this time-honored doctrine, but classified the operation of a fire department as a "purely ministerial" rather than a governmental act. An examination of the cases shows the futility, not to say absurdity, of any such distinction between governmental or public and corporate or private functions for the purpose of predicating tort liability. Building a drawbridge,[6] maintaining a health department,[7] or a charitable institution,[8] confining and punishing criminals,[9] assaults by policemen,[10] operating an elevator in a city hall,[11] driving an ambulance,[12] sweeping and cleaning streets,[13] have been held governmental acts. Sweeping and cleaning streets,[14] street lighting,[15] operating electric light plants,[16] or water works,[17] maintaining prisons,[18] have been held private functions. In *Paterson* v. *The Erie Railroad Company* [19] a city was allowed to recover for destruction of a fire engine although its driver was contributorily negligent. In *Opocensky* v. *City of South Omaha* [20] the court restricted the governmental function of operating a fire department to the answering of emergency calls. In *Kies* v. *Erie* [21] recovery was allowed against a city for negligent construction of doors to a firehouse, but the court declared that no liability would have attached had the doors been negligently operated by the firemen. Such artificial distinctions lead to a suspicion that this doctrine of non-liability of municipal corporations for torts committed in the performance of public functions rests upon historical confusion of principles. The variety and insufficiency of the reasons which have been advanced in its support strengthen this suspicion.

Five reasons have, at one time or another, been given: 1. The state is sovereign and the municipality its governmental agency: no suit can be brought against the state without its consent, therefore none against

[4] Cunningham *v.* City of Seattle, 40 Wash. 59, 82 Pac. 143 (1905); Burrill *v.* Augusta, 78 Me. 118, 3 Atl. 177 (1886); Wilcox *v.* Chicago, 107 Ill. 334 (1883); Jewett *v.* New Haven, 38 Conn. 368 (1871); Fisher *v.* Boston, 104 Mass. 87 (1870). See 1 BEACH, PUBLIC CORPORATIONS, § 744; 3 ABBOTT, MUNICIPAL CORPORATIONS, § 963; 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1660; COOLEY, MUNICIPAL CORPORATIONS, 380.

[5] 126 N. E. 72 (1919).

[6] Daly *v.* New Haven, 69 Conn. 644, 38 Atl. 397 (1897).

[7] Howard *v.* Philadelphia, 250 Pa. St. 184, 95 Atl. 388 (1915); Tollefson *v.* Ottawa, 228 Ill. 134, 81 N. E. 823 (1907).

[8] Leavell *v.* Western Kentucky Asylum for the Insane, 122 Ky. 213, 91 S. W. 671 (1906).

[9] Jackson *v.* City of Owingsville, 121 S. W. 672 (1909).

[10] Lamont *v.* Stavanaugh, 129 Minn. 321, 152 N. W. 720 (1915).

[11] Schwalk's Adm'r *v.* City of Louisville, 135 Ky. 570, 122 S. W. 860 (1909).

[12] Maxmilian *v.* Mayor of New York, 62 N. Y. 160 (1875).

[13] Savannah *v.* Jordan, 142 Ga. 409, 83 S. E. 109 (1914).

[14] Young *v.* Metropolitan Street Railroad Company, 126 Mo. App. 1, 103 S. W. 135 (1907); Denver *v.* Maurer, 47 Colo. 209, 106 Pac. 875 (1910); Missano *v.* Mayor of New York, 160 N. Y. 123, 54 N. E. 744 (1899).

[15] Dickinson *v.* City of Boston, 188 Mass. 595, 75 N. E. 68 (1905).

[16] Saulman *v.* Nashville, 131 Tenn. 427, 175 S. W. 532 (1915).

[17] Bailey *v.* Mayor of New York, *supra.* See Stubbs *v.* City of Rochester, 226 N. Y. 516, 124 N. E. 137 (1919).

[18] Edwards *v.* Pocahontas, 47 Fed. 268 (1891).

[19] 78 N. J. L. 592, 75 Atl. 922 (1910).

[20] 101 Neb. 336, 163 N. W. 325 (1917).

[21] 169 Pa. St. 598, 32 Atl. 621 (1895).

the municipality;[22] 2. The municipality derives no pecuniary benefit or profit from the exercise of public functions;[23] 3. Members of municipal departments in the exercise of public duties are not agents of the city, therefore the doctrine of *respondeat superior* has no application;[24] 4. It is necessary for the proper performance of governmental functions that a municipal corporation should not be liable for the negligence of its servants;[25] 5. Municipalities should not be liable for torts committed in the performance of duties arbitrarily imposed by the legislature, but should be liable only for those committed in performance of duties voluntarily assumed under general statutes.[26] None of these reasons is sound. The immunity of a sovereign from suit rests upon no "formal conception, or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which that right depends." [27] This conception does not underly a municipal corporation.[28] In admiralty, for example, it is well settled that a municipal corporation is liable for the torts of its servants.[29] Moreover, tort liability is not based upon a benefit derived by the tortfeasor. Nor does the character of the service rendered determine the fact of agency; but rather the determining factors are whether the principal employs, pays, controls, and dismisses the servant.[30] In answer to the fourth reason, proper performance of public duties can hardly be said to rest upon the immunity of a public corporation for willful and negligent conduct of its employees. Finally, the voluntary assumption of an unquestioned duty has never been the starting point for liability in the law of torts.

The basis for the doctrine is to be found in its origin, and its origin is to be found in early common-law actions. No action on the case lay by a private individual against a town for the omission to perform a public duty, but the proper procedure was by way of indictment.[31] The lack of private action was later placed upon the ground that towns were usually not corporate and so could not be sued.[32] And still later recovery was denied because of the long-established common-law rule.[33] It is to be noted that these cases were actions for omissions to perform public duties, and they can therefore be placed upon the general doctrine

[22] Frederick *v.* City of Columbus, 58 Ohio St. 538, 51 N. E. 35 (1898). See COOLEY, MUNICIPAL CORPORATIONS, § 115.

[23] Hill *v.* Boston, *supra.*

[24] Burrill *v.* Augusta, *supra;* Wilcox *v.* Chicago, *supra;* Maxmilian *v.* Mayor of New York, *supra;* Hafford *v.* New Bedford, 16 Gray (Mass.) 297 (1860). See 1 BEACH, PUBLIC CORPORATIONS, § 744; 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1655.

[25] See 3 ABBOTT, MUNICIPAL CORPORATIONS, § 963; COOLEY, MUNICIPAL CORPORATIONS, § 115.

[26] Bigelow *v.* Randolph, 14 Gray (Mass.) 541 (1860); Dickinson *v.* Boston, *supra;* Edwards *v.* Pocahontas, *supra.*

[27] Mr. Justice Holmes in Kawananakoa *v.* Polyblank, 205 U. S. 349, 353 (1907).

[28] See Metropolitan Railroad Company *v.* District of Columbia, 132 U. S. 1, 9 (1889).

[29] Workman *v.* Mayor of New York, 179 U. S. 552 (1900); City of Chicago *v.* White Transportation Company, 243 Fed. 358 (1917); City of Chicago *v.* Chicago Transportation Company, 222 Fed. 238 (1915).

[30] Martin *v.* Temperly, 4 Q. B. 298 (1843); Laugher *v.* Pointer, 5 B. & C. 547 (1826).

[31] Bro. Abr., Accion sur le case, pl. 93.

[32] See Thomas *v.* Sorrell, Vaugh. 330, 340 (1706).

[33] Russell *v.* Men of Devon, 2 T. R. 667 (1788); Mower *v.* Leicester, 9 Mass. 237 (1812); Bartlett *v.* Crozier, 17 Johns. (N. Y.) 439 (1820).

that civil liability is not predicated upon omission to act unless such omission is of a legal duty running to the particular individual injured.[34] Negligent performance of an affirmative act presents a different problem.[35] Mr. Justice Blackburn, in *Foreman* v. *Mayor of Canterbury*,[36] properly allowed recovery against a municipality for a servant's negligence in affirmative conduct. But the correct analysis was obscured by Lord Chief Justice Cockburn in *Scott* v. *Mayor of Manchester* [37] when he allowed recovery against a municipal corporation for negligently operating gas works on the ground that the corporation derived a profit from the work.

And so an anomalous doctrine, based upon misconceptions and a confusion of misfeasance with nonfeasance, has become fastened upon the law. The time has come to face anew the real principles involved. The problem is a simple one of agency and torts, and whether there is any reason why ordinary principles should not apply to a municipal corporation. Firemen are in fact servants of the city. When a person, through no fault of his own, is injured by negligent driving of fire apparatus who should bear the loss: the innocent individual, or the corporation and ultimately the community? A principal should be liable for the torts of his agents which arise within the scope of and in the course of the employment.[38] This is the basic conception underlying the law of agency. And to this conception a municipal corporation should form no exception. Injuries caused by negligence of municipal employees are proper items of expense to be borne by the community. For omission to perform public duties running to the community as a whole there should of course be no municipal liability to private individuals.[39] But in the undertaking of an affirmative course of conduct it is immaterial that the duty being performed is a public one from which the municipality derives no profit. Liability should be based upon the exaction of the law that everyone, in the performance of an affirmative course of conduct, must at his peril measure up to a standard of due care.[40] The reasoning in *Fowler* v. *City of Cleveland* [41] is not wholly satisfactory. It can hardly be said that operating a fire department is a ministerial act; nor, as Mr. Justice Wanamaker contends, that a sovereign should be sued in the same manner as any individual because the constitution was designed to protect the individual. Nevertheless the result is desirable. In order to reach it it was necessary to overrule a previous decision of the same court.[42] It is to be hoped that this example will be followed in other jurisdictions when the question arises in the future.

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[34] Union Pacific Railway Company *v.* Cappier, 66 Kan. 649, 72 Pac. 281 (1903).

[35] Hunicke *v.* Meremec Quarry Company, 262 Mo. 560, 172 S. W. 43 (1914); Depue *v.* Flateau, 100 Minn. 299, 111 N. W. 1 (1907); Black *v.* New York, New Haven, and Hartford Railway Company, 193 Mass. 448, 79 N. E. 797 (1907).

[36] L. R. 6 Q. B. 214 (1871). See Mersey Docks *v.* Gibbs, 1 H. L. 93, 111 (1866).

[37] 2 H. & N. 204 (1857).

[38] Howe *v.* Newmarch, 12 Allen (Mass.) 49 (1866); Limpus *v.* The London General Omnibus Company, 1 H. & C. 526 (1862).

[39] See Rochester White Lead Company *v.* City of Rochester, 3 N. Y. 463 (1850).

[40] Bowden *v.* City of Kansas, 69 Kan. 587, 77 Pac. 573 (1904).

[41] 126 N. E. 72 (1919).

[42] Frederick *v.* City of Cleveland, *supra.*